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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 175

PETSONELLA MORAGNE, ETC., PETITIONER

v.

STATES MARINE LINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted by the Solicitor General pursuant to the Court's invitation of December 8, 1969.

OPINIONS BELOW

The opinion of the district court (App. 13) is unreported. The opinion of the court of appeals (App. 55) is reported at 409 F. 2d 32. The opinion of the Supreme Court of Florida on certification from the court of appeals (App. 27) is reported at 211 So. 2d 161.

JURISDICTION

The judgment of the court of appeals (App. 57) was entered in April 1, 1969. The petition for cer-

375-282—70——1

tiorari was filed on May 29, 1969, and was granted on November 10, 1969. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a cause of action for wrongful death may be maintained under maritime law, independent of any statute expressly creating such a right.

STATEMENT

Petitioner, Petsonella Moragne, individually and as personal representative of the estate of Edward Moragne, Sr., brought this action in the Circuit Court for Hillsborough County, Florida, to recover for the wrongful death of Edward Moragne, Sr., a longshoreman in the employ of respondent Gulf Florida Terminal Company. The complaint alleged that on December 21, 1964, while Moragne was at work on the PALMETTO STATE, a vessel owned by respondent States Marine Lines Inc., a hatch beam in one of the vessel's cargo holds fell on him, causing his death on the same day (App. 2). The complaint went on to allege that the proximate cause of the death had been the negligence of States Marine's employees in failing properly to maintain the vessel or, in the alternative, the unseaworthiness of the vessel (App. 3–5).

States Marine removed the cause to the United States District Court of the Middle District of Florida pursuant to 28 U.S.C. 1332 and 1441, alleging that the parties were of diverse citizenship and that the amount in controversy exceeded $10,000 (App. 6–7).

Thereafter, it filed its answer, in which it admitted that Moragne had been a longshoreman lawfully aboard the vessel and that he had been killed by the falling hatch beam, but denied that the hatch beam had fallen as a result of negligence or unseaworthiness. (Multilith Record in the court of appeals at 36–40.)

States Marine also filed a third party complaint against Gulf Florida Terminal Company, Moragne's employer, alleging that, at the time of the accident, Gulf Florida was performing stevedoring services on the vessel under a contract which warranted that it would perform those services in a workmanlike manner. Further asserting that the vessel had been seaworthy when stevedoring operations had started and that Gulf Florida had been in complete control of the area of the vessel in which Moragne was working when the accident occurred, States Marine claimed indemnity on the ground that any negligence or unseaworthiness causing his death had resulted from Gulf Florida's stevedoring operations (App. 8-12).

Gulf Florida filed answers to both the complaint and the third-party complaint, generally asserting that it had not caused the accident (Multilith Record 44–48). It then moved to strike Count II of the plaintiff's complaint, which sought recovery based upon the asserted unseaworthiness of the vessel. The basis of the motion was that maritime law allows no recovery for wrongful death not on the high seas (*i.e.*, beyond the three-mile limit) and that the plaintiff's only possible basis for recovery was under the Florida wrong-

ful death statute (F.S.A. 768–01), which, it was argued, does not permit recovery for unseaworthiness (App. 12).

The district court granted the motion for the reasons asserted by Gulf Florida, and it dismissed with prejudice so much of petitioner's complaint as sought recovery based on the asserted unseaworthiness of the vessel. By leave of the court of appeals, an interlocutory appeal was then taken from this partial dismissal (App. 15).

In their briefs on appeal, the parties limited themselves to the question whether the Florida wrongful death statute permitted recovery for a death caused by the unseaworthiness of a vessel. At the suggestion of States Marine and Gulf Florida, the court of appeals, making use of the procedure provided by F.S.A. 25.031 and Rule 4.61, Florida Appellate Rules, certified that question to the Florida Supreme Court (App. 22–26).[1]

The Florida Supreme Court held that the Florida wrongful death statute did not permit the imposition of liability where the death was not the result of negligence, except in the limited area of the strict liability of a manufacturer for injuries caused by his products (App. 27–41). Thus, that court held (with one justice dissenting) that liability for unseaworthi-

[1] The question was framed in the following terms (App. 26):

> Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the Maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?

ness, which it characterized as a type of liability without fault, was not encompassed by the Florida statute, and it answered in the negative the question certified to it.

The Fifth Circuit then affirmed the judgment of the district court, following this Court's decision in *The Tungus* v. *Skovgaard,* 358 U.S. 588, to the effect that the remedy of a longshoreman for wrongful death within the territorial waters of a State is delimited by that State's law (App. 55–56).

ARGUMENT

INTRODUCTION AND SUMMARY

At the time of his death, Moragne was working as a longshoreman on board the PALMETTO STATE, which was anchored in the territorial waters of Florida. Moragne was performing work traditionally performed by seamen and therefore was owed the duty of seaworthiness. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85. As this Court noted in *Sieracki,* the vessel owner's obligations to supply a seaworthy ship is "a form of absolute duty owing to all within the range of its humanitarian policy" (328 U.S. at 95). See *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96. The complaint in the present case alleges that the fall of the hatch beam that killed Moragne was the result of a defect in the locking mechanism which held the beam in place (App. 4–5). If the allegations are true (as must be assumed for present purposes), there can be little doubt that the PALMETTO STATE was unseaworthy, and its unseaworthiness was the cause of the

fatal injury. Cf. *Crumady* v. *The J. H. Fisser*, 358 U.S. 423.

The court of appeals held, however, that the alleged breach of the duty to provide a seaworthy vessel could not be invoked in this case to establish the liability of States Marine for damages to Moragne's survivors because that ground of recovery is not encompassed by the wrongful death act of Florida—a statute enacted without concern for the special policies of the seaworthiness doctrine, and, indeed, a statute to which the concept of unseaworthiness is "completely foreign" (Pet. App. 12).

The decision of the court of appeals presumably is compelled by this Court's decision in *The Tungus* v. *Skovgaard*, 358 U.S. 588, which was occasioned by the rule announced in *The Harrisburg*, 119 U.S. 199, that maritime law does not permit an action for wrongful death in the absence of a statute creating such a right. In an action for maritime wrongful death on the navigable territorial waters of a State, this Court has held, the only applicable remedy is that provided by the wrongful death statute of the State upon whose waters the death occurred. *The Harrisburg, supra; The Tungus* v. *Skovgaard, supra; Western Fuel Co.* v. *Garcia*, 257 U.S. 233.

Thus, although Moragne could have recovered damages for the breach of the acknowledged maritime duty to provide a seaworthy vessel had he survived, the fact that his injury was serious enough to result in his death is, by virtue of this rule, a bar to any recovery for the breach. Our submission is that this result is no longer, if it ever was, required, and that it

would be appropriate for this Court to overrule *The Harrisburg* if it believes that the time has come for this step in the development of the maritime law.

THE RULE IN *The Harrisburg*, 119 U.S. 199, THAT THERE IS NO CAUSE OF ACTION FOR WRONGFUL DEATH UNDER THE GENERAL MARITIME LAW IS OUTMODED AND SHOULD NOW BE REPLACED BY A MORE MODERN RESOLUTION OF THIS PROBLEM

1. *The Harrisburg*, 119 U.S. 199, is the source of the rule that no action for wrongful death can be maintained under American maritime law without a statute creating such a right. That case was an action *in rem* by the widow and child of an officer of a vessel who was fatally injured when the vessel collided with THE HARRISBURG in the territorial waters of Massachusetts. The home port of THE HARRISBURG was Philadelphia and the action was brought in the District Court for the Eastern District of Pennsylvania. The district court found that the collision had been caused by the negligent navigation of THE HARRISBURG, and awarded $5100 to the libellants. The circuit court affirmed, although it noted some doubt as to the soundness of its holding. 15 Fed. 610, 614. Conclusions of law were entered that "[i]n the admiralty courts of the United States, the death of a human being upon the high seas, or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed under the general maritime law" (15 Fed. 610, 614). It was noted that, although the action could not have been maintained in the state courts under the wrongful death acts of either Pennsylvania or Massachusetts

because their one-year periods of limitation had expired, that fact did not bar recovery in a suit arising within the federal admiralty jurisdiction (*id.* at 614–615).

On appeal, this Court reversed. In an exhaustive review of the prior decisions, the Court agreed with the lower courts that there was substantial authority in Federal cases that the general maritime law did afford a remedy for wrongful death in the absence of a statute—although the common-law rule was to the contrary. In *The Sea Gull*, 21 Fed. Cas. 909 (No. 12,578) (C.C.D. Md.), for example, Chief Justice Chase, sitting on circuit, had questioned why recovery was not possible if death resulted from negligent injury, while recovery was allowed if the victim lived. "It is difficult to answer this question," he continued, "and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules" (21 Fed. Cas. at 910). On this basis, he granted a recovery for wrongful death under the general maritime law. The same result had been reached, upon similar reasoning, in other cases cited in *The Harrisburg*: *Plummer* v. *Webb*, 19 Fed. Cas. 894 (No. 11,234) (D. Maine); *The Towanda*, 24 Fed. Cas. 74 (No. 14,109) (C.C. E.D. Pa.); *The Charles Morgan*, 5 Fed. Cas. 511 (No. 2,618) (S.D. Ohio); *Holliday* v. *The David Reeves*, 12 Fed. Cas. 386 (No. 6,625) (D. Md.); *The Garland*, 5 Fed. 924 (E.D. Mich.); *Holmes* v. *O. & C. Ry. Co.*, 5 Fed. 75 (D. Ore.); *The E. B. Ward*, 17 Fed. 456 (C.C. E.D. La.); *The Manhasset*,

18 Fed. 918 (E.D. Va.); *The Columbia*, 27 Fed. 704 (S.D. N.Y.).

The Court noted that the basis for these holdings was the belief that "the [rule at] common law is not founded on good reason, and is contrary to natural equity and the general principles of law" (119 U.S. at 213). Yet, without detracting from the force of this argument, the Court concluded that it was unable to escape the implications of its earlier holding in *Insurance Company* v. *Brame*, 95 U.S. 754, that such an action could not exist at common law without a statute (119 U.S. at 213, emphasis added):

> Since, however, it is now established [*i.e.*, by *Insurance Co.* v. *Brame, supra*] that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, *we are forced to the conclusion* that no such action will lie in the courts of the United States under the general maritime law. * * *

The Court thus rested its holding in *The Harrisburg* squarely upon the common-law rule.

2. The reasons underlying the rule at common law that an injury causing death could not be the subject of a civil action are somewhat obscure, but it seems clear that no consideration currently exists for holding that a violation of a duty that causes death is not

actionable, while violation of such a duty causing an injury short of death is actionable.

The first clear statement of the rule as it is presently known was made by Lord Ellenborough, sitting at *nisi prius*, in *Baker* v. *Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). There, in an action by a husband against a stage-coach company for the death of his wife when the coach in which they rode overturned, Lord Ellenborough held, without citation of authority or supporting reasoning, "[i]n a civil Court, the death of a human being could not be complained of as an injury * * *."

Later historical study of this decision led to the conclusion that the only ground upon which it might be supported was the early common-law doctrine of merger of the civil wrong in a felony. See Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431 (1916); Pollock, *The Law of Torts*, 63 (12th ed. 1923). According to this doctrine, where a wrongful act constituted both a tort and a felony, the tort was regarded as being less important than the offense against the Crown, and the civil wrong was merged into, or pre-empted by, the felony; it could not then be the subject of a civil action. *Higgins* v. *Butcher*, Yelv. 89, 80 Eng. Rep. 61 (K. B. 1607); *Smith* v. *Sykes*, 1 Freem. 224, 89 Eng. Rep. 160 (K. B. 1677). There was some question whether the felony merger rule extinguished the civil wrong or merely delayed it, but that problem was largely irrelevant because punishment for felony was the death of the felon and the forfeiture of his chattels and escheat of

his real property to the Crown. Thus, after the criminal punishment had been exacted nothing remained of the felon or his property on which to base a civil action. See Holdsworth, *supra,* at 433–434.[2]

In 1916, the House of Lords held that the felony merger rule was the proper historical basis for the holding in *Baker* v. *Bolton,* and held further that even though the felony merger rule was no longer a part of the law, there could still be no action for wrongful death absent a statute. *Admiralty Commissioners* v. *S.S. Amerika,* [1917] A.C. 38. The rationale of the Lords' decision appears to be that, since there once was a justification (*i.e.,* the felony merger doctrine) for the prohibition of nonstatutory death actions, that prohibition should continue even though the justification was gone. See Pollock, *supra,* 63; 3 Holdsworth, *History of English Law,* 676–677 (3d ed. 1923). Lord Parker's opinion stated that while the result reached is "anomalous * * * to the scientific jurist" it is based on "historical grounds" and should not be disturbed (*Admiralty Commissioners, supra,* at 50). He also suggested (*id.* at 42–43) that there was force to Baron Bramwell's dissent in *Osborn* v. *Gillett,*

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[2] The cases recognizing the felony merger doctrine were all decided in the seventeenth century, with no further mention of the problem in a wrongful death case until *Baker* v. *Bolton.* Holdsworth suggests that the reason why this state of the law was tolerated for such a long period may in part have been that the relatives of people killed by wrongful acts might have obtained a sum of money from the wrongdoer by threatening to bring a criminal appeal (*i.e.,* a criminal action instituted by a private person). Holdsworth, *supra,* at 435.

8 L.R. Exch. 88, 94 (1873), where Bramwell had forcefully argued that a cause of action for wrongful death should be allowed, and had cast doubt upon the accuracy of the report of *Baker* v. *Bolton*.

It is noteworthy that, 20 years later, the House of Lords criticized its decision in *Admiralty Commissioners* and limited it to its facts. *Rose* v. *Ford*, [1937] A.C. 826. Lord Atkin stated that the reasoning of the earlier decision "may seem unsatisfactory" and that the result was "illogical" (*id.* at 833, 834).

3. In addition to the admiralty cases discussed above, pp. 8-9, *supra*, some early non-maritime American cases refused to follow the English rule announced in *Baker* v. *Bolton*. See, *e.g.*, *Sullivan* v. *Union Pac. R. Co.*, 23 Fed. Cas. 368, 371 (No. 13,599) (C.C.D. Neb. 1874) (where the court said that the rule was "incapable of vindication" and "[not] deeply rooted in the common law"); *Shields* v. *Yonge*, 15 Ga. 349 (1854); see also *Cross* v. *Guthery*, 2 Root 90, 92 (Conn. 1794). Nevertheless, the generally accepted rule in the United States in non-admiralty cases conformed to the English rule. In *Insurance Company* v. *Brame*, 95 U.S. 754, after a review of the American decisions, this Court concluded that a wrongful death, in the absence of a statute, was not actionable under the "general" Federal common law, and, as shown above, it was that case which served as the primary authority for the Court's later holding in *The Harrisburg*. See 119 U.S. at 204, 208.

The felony merger doctrine, however, was not avail-

able to American courts to support these holdings. That doctrine had no place in American law except, in limited instances, to delay a civil action until after the criminal trial. But because in this country (unlike England), there were no forfeiture-of-property provisions as punishment for felony, that narrow exception could not serve as a substantial reason for precluding wrongful death actions. *E.g.*, *Hyatt* v. *Adams*, 16 Mich. 180, 185–188 (1867); *Grosso* v. *Delaware, Lackawanna & Western R. Co.*, 50 N.J.L. 317, 319–320 (1888); see Prosser, *Torts* 8 (3d ed. 1964).

Some courts found justification for their holdings in an asserted difficulty in computation of damages for a wrongful death. *E.g.*, *Van Amburg* v. *Vicksburg R. Co.*, 37 La. Ann. 650, 651 (1885); *Green* v. *Hudson River R. Co.*, 28 Barb. 9, 18 (N.Y. 1858); *Connecticut Mutual Life Insurance Co* v. *New York & New Haven R. Co.*, 25 Conn. 265, 272–273 (1856). But such a calculation was made without difficulty in *Hollyday* v. *The David Reeves*, 12 Fed. Cas. 386, 388 (No. 6,625) (D. Md.), and the computation of the loss sustained by dependents as the result of a wrongful death is, of course, generally required in the administration of wrongful death statutes. See Smith, *Wrongful Death Damages in North Carolina*, 44 N.C.L. Rev. 402 at 405, n. 17.

Other courts appear to have improperly applied the maxim *actio personalis moritur cum persona*. *E.g.*, *Eden* v. *Lexington & Frankfort R. Co.*, 53 Ky. 204, 206 (1853); *Green* v. *Hudson River R. Co.*, 28 Barb. 9, 17 (N.Y. 1858). This axiom, whatever its current validity (cf. *Cox* v. *Roth*, 348 U.S. 207, 209–210),

deals only with the issue whether the victim's personal action (*e.g.*, for pain and suffering) survives his death, and has no relevance with respect to the distinct question whether a dependent may maintain an action for the loss to him caused by the death. See Winfield, *Death As Affecting Liability in Tort*, 29 Colum. L. Rev. 239, 241–250, 253 (1929).[3]

Finally, some courts offered no other justification than that the rule had been established by prior decisions and was not to be disturbed. *Grosso* v. *Delaware, Lackawanna & Western R. Co.*, 50 N.J.L. 317, 321 (1888); *Green* v. *Hudson River R. Co.*, 28 Barb. 9, 17 (N.Y. 1858). Indeed, this appears to have been the approach used by this Court in *Insurance Co.* v. *Brame, supra,* in which no reason was stated in support of the general rule other than that it was established at common law.[4]

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[3] Holdsworth suggests that Lord Ellenborough's decision in *Baker* v. *Bolton* itself may have been influenced by an erroneous application of the maxim. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431, 435 (1916).

[4] *Brame* was a suit by an insurance company against the alleged murderer of its insured for payment of the amount of a life insurance policy that it had had to pay by reason of the insured's death. The Court expressed the view that this injury to the insurance company was too remote to be protected by tort law, 95 U.S. at 758–759. This ground itself was sufficient to support the Court's ruling against the insurance company, and the Court's additional statement that in no case can wrongful death give rise to a tort action independent of a statute was actually not necessary to the result. Similar alternative reasoning was set forth by Lord Sumner in *Admiralty Commissioners* v. *S. S. Amerika*, *supra*, [1917] A.C. at 59–60, and upon this ground the holding was limited in *Rose* v. *Ford*, *supra*, [1937] A.C. at 850.

4. That no public policy presently exists for denying a remedy for wrongful death is illustrated by the universal disapproval by legislatures of the common-law rule preventing recovery for wrongful death. The first of these statutes was Lord Campbell's Act, 9 & 10 Vict. c. 93 (1846). Today, every State in this country has enacted a wrongful death statute. See the tabulation and comparison of these statutes in Smith, *Wrongful Death Damages in North Carolina*, 44 N.C.L. Rev. 402. The Federal Tort Claims Act, 28 U.S.C. 1346(b), provides that, in certain circumstances, the United States may be held liable for negligently caused wrongful death to the same extent as a private person. See, *e.g.*, *Richards* v. *United States*, 369 U.S. 1. And Congress has also created an action for wrongful death in the Federal Employers' Liability Act, 45 U.S.C. 51, 59; the Jones Act, 46 U.S.C. 688, and the Death on the High Seas Act, 46 U.S.C. 761, 762.

The effect of these statutes, as a whole, has been to abolish whatever justification there once was for the flat refusal by courts to allow actions for wrongful death. See Landis, *Statutes and the Sources of Law*, Harvard Legal Essays in honor of Joseph Henry Beale and Samuel Williston, 213, esp. at 226–227 (1934). Mr. Justice Holmes (speaking for himself, Chief Justice Taft, and Justices Brandeis and McKenna) said:

> [I]t seems to me that courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering

> only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope. [Citation omitted.] Without going into the reasons for the notion that an action (other than [a criminal] appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it ever was more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for the felony, has been shown not to be the policy of the United States and of most if not all of the States. * * *

Panama R. Co. v. *Rock,* 266 U.S. 209, 216 (dissenting opinion). Finally, in commenting adversely upon the decision in *Graham* v. *A. Lusi, Ltd.,* 206 F. 2d 223 (C.A. 5), a case practically indistinguishable from the present,[5] Dean Pound said:

> [The decision] proceeds on a mode of thinking about legislation that is wholly out of date. Lord Campbell's Act is now well over a century old and has been adopted in every common-law jurisdiction. To think of recovery for wrongful death as something exceptional not

[5] *Graham* was a libel for wrongful death filed in admiralty by the wife of a seaman killed when a defective chain parted and a cargo boom fell and struck him. The court of appeals held (citing *The Harrisburg*) that there was no cause of action for wrongful death due to unseaworthiness in the absense of a statute, that the law of Florida, which gave no remedy for unseaworthiness, must apply and that recovery had been properly denied in the absence of a finding of negligence.

> to be treated as part of the general law but to be provided for specifically as to application to every item of recent legislative improvement of the law is an anachronism. Today we should be thinking of the death statutes as part of the general law. * * *

Pound, Comment on *State death statutes—Application to death in admiralty,* 13 NACCA L.J. 188, 189 (1954).

5. Apart from the general question whether an action for maritime wrongful death can be maintained independently of a statute creating such a right, there is the specific question whether in situations like the present (*i.e.*, where a longshoreman acting as a seaman dies because of an injury received while upon the territorial waters of a State), Congress has affirmatively indicated an intention to exclude a wrongful death action based upon breach of the obligation to supply a seaworthy ship, and instead to relegate suitors exclusively to whatever remedy is available under State law. We think that no such Congressional determination appears.

In 1920, Congress passed the Death on the High Seas Act, 46 U.S.C. 761 *et seq.* Section 1 of that statute (46 U.S.C. 761) provides in pertinent part:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State * * * the personal representative of the decedent may maintain a suit for damages * * * in admiralty for the exclusive benefit or the decedent's wife, husband, parent, child, or dependent relative

> against the vessel, person, or corporation which would have been liable if death had not ensued.

The Act thus creates a right of action for wrongful death only upon the high seas, beyond the territorial waters of the states.

In Section 7 of the Act (46 U.S.C. 767) Congress further provided that

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this [Act]. Nor shall this [Act] apply to the Great Lakes or to any waters within the territorial limits of any State * * *.

As this Court has held, this Section manifests a legislative purpose that State laws governing wrongful death should continue to be available, according to their terms, where no remedy is provided by the Death on the High Seas Act. *The Tungus* v. *Skovgaard*, 358 U.S. 588, 593. But neither the language of the Act, nor its legislative history, gives any indication that this preservation of State law was intended by Congress to preclude the federal courts from vindicating the peculiarly federal, maritime interest at issue in this case—namely, the right of a person acting as a seaman to be supplied a seaworthy vessel on which to work. It ought not to be supposed, without unequivocally expressed Congressional intent, certainly absent here, that Congress, in passing the Death on the High Seas Act, intended to cede exclusively to

the States the task of protecting such important maritime interests.

That no such a result was contemplated by Congress is underlined by the fact that in 1920, when the Death on the High Seas Act was passed, "the seaman's right to recover damages for injuries caused by the unseaworthiness of the ship was an obscure and relatively little used remedy." Gilmore & Black, *The Law of Admiralty* 315 (1957). Moreover, it appears that at least prior to this Court's decision in *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255 (1922), and perhaps until its decision in *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96 (1944), the determination whether a vessel owner had failed to meet the duty to supply a seaworthy vessel depended upon his exercise of due diligence—the most common negligence standard governing liability in personal injury actions. Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers,* 39 Corn. L.Q. 381, 392–393, 396 (1954); see, *e.g., Storgard* v. *France & Canada S.S. Co.,* 263 Fed. 545, 547 (C.A. 2, 1920); *The Henry B. Fiske,* 141 Fed. 188, 190 (D. Mass., 1905). It remained for the *Sandinger* and *Mahnich* cases to formulate the more demanding standard of strict liability for unseaworthiness which prevails today. Thus Congress in 1920 may well have contemplated that the standard of behavior that the states would generally apply in determining liability—*i.e.,* the exercise of due care—was the same as that im-

posed by federal maritime law in nonfatal accidents. There is no indication that Congress intended the anomaly created by the decision below—that breach of the obligation to provide a seaworthy vessel is actionable if a nonfatal injury results, but may be *damnum absque injuria* if the injury is so serious as to cause death.*

6. Finally, the overruling of *The Harrisburg* would help correct an undesirable lack of uniformity in maritime actions and would relieve State courts (or federal courts applying State law) and State legislatures of the obligation, created by *The Harrisburg* and *The Tungus*, of accommodating State law to exclusively maritime policies and considerations—matters with which the States rarely are involved.

The recognition of a right to recover under the general maritime law for death caused by the breach of the obligation to supply a seaworthy vessel would assure that the substantive standard governing conduct and duty of vessel owners would be the same throughout all the navigable waters of the United States, a result entirely in harmony with the

* It is noteworthy that no issue of this sort was presented in *The Harrisburg*. There, the problem was that the one-year statutes of limitations of the wrongful death acts of Massachusetts and Pennsylvania had expired before the action was started. No question concerning the standards of behavior comprehended by those statutes, or by the maritime law, appears to have been presented. Thus, for all that appears in the opinion, there was no plainly discernable federal maritime policy that could not have been vindicated by State law had the action been brought before the expiration of one year. Cf. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221.

Constitutional concept of the federal admiralty jurisdiction as

> a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention [of the framers of the Constitution] to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 21 Wall. 558, 575.[7] And, as might be expected, experience with the application of *The Tungus* has shown that State law does not provide ready guidance as to standards in maritime cases. Courts have encountered considerable difficulty in determining from the terms and purpose of State wrongful death acts whether the State law encompasses a cause of action for breach of the obligation to supply a seaworthy vessel. See, *e.g., Grigsby* v. *Coastal Maine Service,* 412 F. 2d 1011, 1023–1029 (C.A. 5, Louisiana law); *Union Carbide Corp.* v. *Goett,* 278 F. 2d 319, 321 (C.A. 4, on remand from

[7] Presumably, the existence of a uniform non-statutory action for wrongful death in admiralty would not be limited to seaworthiness cases, and would permit the application of a single standard of conduct to govern both fatal and non-fatal injuries in all personal injury actions. Thus other equally anomalous situations in which a differing standard of liability has been required by application of State law in cases involving death would be rectified. *E.g., Hess* v. *United States,* 361 U.S. 314.

361 U.S. 340, West Virginia law).[8] Their difficulty itself suggests the inappropriateness of continued adherence to the rule of *The Harrisburg*.

CONCLUSION

Ordinarily, changes in the law come through legislative action. But the courts have a role, too, in the development of the law, and this is particularly true in the case of the maritime law, which, historically, is so much the product of judicial decision. Such judicial action is especially appropriate to fill in the gaps in the interstices, and to bring uniformity, where the path has long since been clearly marked out by legislative action establishing the basic policy. We suggest this is such an occasion.

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[8] In both of these cases, the State wrongful death act did not expressly encompass deaths resulting from breaches of the duty to provide a seaworthy vessel. The courts concluded that the statutes nevertheless comprehended actions for breach of this duty by relying on the breadth of the statutory terms and the finding that the legislatures intended by such language to reach all wrongs, including those not specifically adverted to. By contrast, the Florida Supreme Court in the present case, interpreting a statute of similarly broad terms, held that the Florida legislature could not have intended to cover the "completely foreign" maritime concept of unseaworthiness. (App. 37).

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
JOSEPH J. CONNOLLY,
Assistants to the Solicitor General.

ALAN S. ROSENTHAL,
DANIEL JOSEPH,
Attorneys.

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